

## **Article published in Brief Magazine**

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### ***Use of discovered documents***

The Legal Practitioners Complaints Committee recently considered a complaint concerning the improper use of discovered documents. In dealing with the complaint, it was apparent that the situation had arisen through a lack of awareness of the legal position on the part of the practitioners involved.

The committee was therefore concerned to ensure that the profession was made aware of the legal position.

When practitioners receive documents as a result of inspecting discovered documents, they are bound by an implied undertaking to use the documents not for any collateral or ulterior purpose but only in furtherance and for the purposes of the action in which they are disclosed.

This undertaking is binding on anyone into whose hands the documents fall in the knowledge that they were obtained by discovery (see *Pacific Basin Exploration Pty Ltd v XLX NL* [1985] WAR 11).

In the case which came before the committee, one of the practitioners had been involved in family law proceedings and had obtained a copy of a document disclosed by the other party.

However, that party was also the plaintiff in a District Court action in which another practitioner in the same firm was representing the defendant.

The family law practitioner passed a copy of the discovered document to the practitioner handling the District Court action.

The family law practitioner, in making such use of the discovered document, breached the implied undertaking and placed the latter practitioner, who had received the document, in a situation of conflict of interest whereby that latter practitioner was required, as a result of the implied undertaking, not to use the document but at the same time was obliged to use all knowledge and information which that practitioner was in possession of to further the client's interests.

The problems which arose in this case could have been avoided by making an application to the court to release the practitioners from their implied undertaking regarding the use of discovered documents.